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LEGISLATIVE JOINT JUDICIAL BRANCH, LAW ENFORCEMENT AND
JUSTICE COMMITTEE, Representative Ray Hawk, Chairman.

SUPPORTING GOVERNOR BRIAN SCHWEITZER'S BUDGET
PROPOSAL FOR THE OFFICE OF THE STATE PUBLIC DEFENDER TO
BE INCLUDED IN HOUSE BILL #2.

Mr. Chairman and Committee Members:

I am pleased to testify today on behalf of one of the most diverse and
hardest working committees in state government.

I will address three subjects:

1. The current system is far more fiscally responsible than past practices.
2. The system is delivering superior representation to the citizens it serves.
3. The financial demands of the system are driven by many external factors over which we have no control.

I will also be pleased to answer any questions or refer those questions to
Office of the Public Defender personnel who are present here today,
including Chief Public Defender Randi Hood and our Chief Financial
Officer, Harry Freebourn.

1. FINANCIAL RESPONSIBILITY: While we have taken many steps to financially optimize the system, I want to discuss just three.

A. A more than 60% reduction in expert witness costs. We have drafted and adopted protocols for payment of expert witness fees requiring the expert engaged to charge for services at a prescribed rate – previously experts were free to charge and did charge their prevailing rate. We have identified and made available local experts who charge a more reasonable rate than out-of-state experts engaged under the former system. We require pre-approval of projected services in order to guarantee the service is the appropriate one for the circumstances. e.g. many full psychiatric evaluations that were performed in the past were unnecessary – often a chemical dependency evaluation at less than half the cost would have sufficed.

B. Diligent review of contract lawyer billing. Let me say from the outset that the more than 150 private lawyers across this state with which we contract are doing quality work for less than half of the prevailing rates for private attorneys. We are proud to have them as a part of this system. The enabling bill which formed this system, however, afforded us the opportunity to critically review billing by lawyers that had been summarily approved without review under the former system. We have done just that. Larry Murphy, a quality lawyer in his own right and our contracts division head, diligently reviews all billing submitted by contract lawyers.

The bill also allows us to avoid entering into any long-term contracts which guarantee the assignment of cases to any given attorney. We have learned from the mistakes made by other systems and also done that. Instead, Mr. Murphy, with our guidance, has adopted a Memorandum of Understanding (MOU) to be signed by the contracting attorney which makes it clear we have no obligation to assign any case or number of cases to that attorney and can stop doing so at any time. While it is impossible to quantify our savings because no meaningful data existed prior to the creation of this system, I can assure you the people of this state are not being over-billed for the contract legal services provided. One glaring example of such excess prior to our taking over the system: In one year a particular contract lawyer handled approximately 80 felony cases (just

over half of our case load standard). He tried none. (National averages would have projected at least two trials). He filed no pre-trial motions. He pled all or nearly all of his clients guilty. He took and extensive European vacation. He billed the county for more than 2,600 hours in a calendar year. He had virtually no overhead (a phone and the occasional use of an office). He was paid in excess of \$160,000. The policies and practices we have adopted have eliminated the possibility of this sort of dubious fiscal policy.

C. Efficient marshaling of resources. While there are many examples I could give you, I want to point out just one – our appellate defender system. Virtually all our appeals are being argued by our in-house appellate defenders regardless of whether the lower court proceedings were handled by employed or contracting counsel. Those appellate defenders have been processing in excess of 28 writs or appeals per attorney per year. That number would be unattainable by a trial level attorney – someone who does not routinely engage in the process of reviewing trial records and transcripts, researching critical legal issues and drafting appellate pleadings which are both different and more formal than trial briefs. Anecdotally, I am a trial attorney. I seldom argue appeals. I have just now finished drafting an appellate brief for the Montana Supreme Court. I have expended in excess of 150 hours preparing just my initial brief. At that efficiency, I could handle no more than 13 appeals per year. Under the former system, virtually all appeals from judgments in cases handled by contract trial-level lawyers were argued on appeal by those same lawyers.

I would like to add that our financial successes, to a great extent, have been made possible by Chief Public Defender Randi Hood's prescience in hiring Harry Freebourn as our Chief Financial Officer.

2. SUPERIOR REPRESENTATION OF CLIENTS.

A. Standards of Practice. As I previously stated, this has been a working commission. We have adopted over 150 pages of standards of practice and performance which must be adhered to by employed and contract attorneys. These standards are on the cutting edge nationally.

They ensure prompt, competent and effective representation of every citizen whose legal rights this body has placed in our hands.

B. Specialized Legal Education Opportunities

The Office of the State Public Defender, through the efforts of Eric Olson, the Training Officer, has formulated a training curriculum unprecedented in the history of this state, or, for that matter, this nation. Mr. Olson has produced continuing legal education courses for both the newcomers and veterans in this system on more than 50 different topics – ranging from the unique issues in representing minority clients (especially Native Americans) – to the nuts and bolts of interviewing a witness to an alleged crime – to recognizing when criminal conduct is purely symptomatic of and explained by recognized yet untreated mental illness. Prior to the creation of this system, these programs were either not available, or available only at the considerable expense of traveling to and attending high-tuition national programs. I might add that the vast majority of these programs have been presented at state facilities where the lawyers (become students), driven by an appetite for knowledge and a dedication to their client's rights – were willing to bunk in state forestry and university dormitories and sustain themselves on cafeteria food.

In 1979, when I was a public defender, Missoula County reimbursed me for attending a trial training school in Houston, Texas. The cost exceeded \$3,000. Thirty years later, we're putting on better quality programs for a fraction of that cost per student in 2009 dollars.

C. Judicial recognition of improved representation. As a member of this committee, I have diligently sought out the opinions of District Court judges in my area and before whom I've appeared elsewhere. They uniformly agree that the lawyers who serve this system and the clients it assigns to them are more competent, better trained and more focused in their work than was previously the case. Ms. Hood advises the Supreme Court justices have commented on more than one occasion that appellate briefs and arguments have improved markedly across the board.

The vast credit for our success in this area can be attributed to our decision to hire Randi Hood as Chief Public Defender. Ms. Hood sailed the best ship in the state prior to the creation of this system. She has

continued to demand that level of performance since we hired her.

3. EXTERNAL FORCES WHICH IMPACT OUR EXPENSES. This system has only limited control over its workload and resulting expenses. Three significant factors that impact our expenses are the economy, the courts, and prosecutors.

A. The economy. While the link between crime rates and the economy is complex, there is a general agreement that harsh economic times result in significant a significant rise in crime rates. See attached Appendix "A". We are in those times now. We experienced a 4% case load increase last year. As economic times get harsher, I anticipate the size of that increase will rise.

B. The courts. As an example, in the last few years the 9th Circuit Court of Appeals has decided several cases in which it has either held or suggested that a defendant's pre-sentence interview with his probation officer is "a critical part of the court proceeding" during which the defendant was entitled to be represented by his counsel. See e.g. *Hoffman v. Arave*, (2001). Historically, public defenders in this state have not attended those interviews. At current funding, we lack the resources to hire enough staff attorneys or pay contract lawyers to do so. There is a very real possibility the Montana Supreme Court will follow the federal court decisions. I estimate mandating this practice would add between \$1,000,000 to \$2,000,000 per year to our annual budget. On the other hand, our failure to do so, even now, places us at risk of legal malpractice claims that could exceed that figure.

C. The Prosecution. Our case load is controlled by Prosecutors. The more crimes the Prosecutors charge, the greater our case load. Secondly, the penalties sought by Prosecutors can also have a huge impact on our budget. A single Prosecutor's decision to seek the death penalty will increase our budget by no less than \$100,000 and probably multiple times that figure. This increase will occur in spite of the fact that the OPD has taken to heart the State of Georgia experience in which death penalty cases were assigned to contract lawyers, resulting in astronomical legal fees. This was the single largest contribution to the bankruptcy of that

system. Ms. Hood has astutely kept potential death penalty cases in house.

This system was created based on tenets which have come to be known as the Ten Commandments for Public Defender Systems. Several of those standards speak to the need for a public defender system to act as independently as possible from influences of other governmental branches, whether judicial, legislative or executive. Inevitably, however, the system cannot act independently of the life-line this body provides – financing.

On the other hand, Ms. Hood is required to adhere to an ethical code which is uniform across this nation. That code requires she not allow this system to take on more clients than the resources afforded her will allow her to continue to effectively represent. This ethical consideration, in the context of public representation of indigent citizens, was confirmed and explained in an opinion adopted by the American Bar Association approximately two years ago. In sum, it requires Ms. Hood to refuse to assign counsel to a citizen – no matter how dire her or his plight – no matter how unjust the allegation against her or him – if this body has not afforded her the financial resources to continue to adequately represent that one more client. In the past two years, public defenders in seven states have taken that stance.

As I indicated previously, our case load was up 4% last year. This budget, as Mr. Freebourn can explain far better than I, results in virtually no increase for us. I anticipate we will see even larger case load increases in the next few years. The Governor remains optimistic that funding at this level will allow Ms. Hood to avoid having to perform her ethical obligation of shutting down this system. Personally, I have grave concerns he may be wrong.

Nevertheless, as a commissioner, I support the Governor's budget. I sincerely hope that my concern about an imminent state-wide legal crisis of unprecedented proportion – a concern born of a dedication to see this system which you have placed in our hands succeed, and a commitment to the legal tenets that make our justice system the best in the world – is just that: my unwarranted concern. I cannot stand here, however, and promise you that we won't be back, hat in hand, asking for more money to responsibly carry out our job – responsibly operating the system this body

created.

I am scheduled to be in District Court in Helena at 10:30 this morning.
I apologize in advance if I leave this hearing prior to its termination.

APPENDIX A

Reduced wages, higher unemployment rates, and lower government benefits played a crucial role in the rise of street crime and the growth of street drug markets. Likewise, improved economic conditions in many cities after 1993 begin to explain the recent reductions in street crime. It is no coincidence that street crime rates have fallen to their lowest levels in thirty-five years in a period when unemployment and poverty rates have also dropped back to the levels last seen in the more prosperous 1960s

- Winslow, G., *The Monthly Review*, Volume 52, Number 6 (Nov. 2000).

From 1979 to 1997, federal statistics show the inflation-adjusted wages of men without a college education fell by 20 percent. Despite declines after 1993, the property and violent crime rates (adjusted for changes in the country's demographics) increased by 21 percent and 35 percent respectively during that period.

* * *

Weinberg said the strongest finding in this new study is a link between falling wages and property crimes such as burglary. However, the study also found a link between wages and some violent crimes - such as assault and robbery - in which money is often a motive.

- E. Gould, *et al. Crime Rates and Local Labor Market Opportunities in the United States: 1979-1991. REVIEW OF ECONOMICS AND STATISTICS*, (Feb. 2002), Vol. 84, No. 1: 45-61.

One affect of the downturn that many police departments are preparing to deal with is an increase in domestic violence — much of it unreported. Domestic violence has historically increased as the economy goes down, owing to an increased sense of helplessness and frustration by individuals who have been laid off or cannot find employment.

- *Will Crime Go Up as the Economy Goes Down*, NETWAVE FINANCE, (11/25/08).

WASHINGTON (AP) - The number of U.S. crimes rose last year for the first

time in a decade, an increase that coincided with an economic downturn that many experts say played a key role. Murder, armed robbery, rape and burglary all were higher in 2001, the FBI reported Monday.

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"The economy has to be the prime suspect," said James Lynch, professor at American University's Department of Justice, Law and Society.

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The crime index increased 2.1 percent last year, the FBI said in its annual report drawn from 17,000 law enforcement agencies nationwide.

- *Economy the Prime Suspect* - Crime is On the Rise, YAKIMA
HERALD-REPUBLIC (10/29/2002).

APPENDIX B

Public defenders' offices in at least seven states are refusing to take on new cases or have sued to limit them, citing overwhelming workloads that they say undermine the constitutional right to counsel for the poor.

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In September, a Florida judge ruled that the public defenders' office in Miami-Dade County could refuse to represent many of those arrested on lesser felony charges so its lawyers could provide a better defense for other clients.

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If the judge's decision is upheld, it will force courts here to draw lawyers from a smaller state office and contract with private lawyers to represent defendants, at greater expense.

- Public Defenders Refusing New Cases in Seven States,
NEW YORK TIMES (11/08/2008).

STATE OF MONTANA
OFFICE OF THE STATE PUBLIC DEFENDER
STRATEGIC PLAN

GOALS, OBJECTIVES, AND ACTION ITEMS

GOAL 1: Maintain and improve a statewide appellate defender system to provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to appeals at public expense.

GOAL 2: Ensure that the system is free from undue political interference and conflicts of interest.

GOAL 3: Monitor that appellate defender services are delivered by qualified and competent counsel.

GOAL 4: Assure that the system utilizes state employees and contracted services to avoid conflicts of interest and to process appeals in a timely manner.

GOAL 5: Advocate for adequate funding of the statewide appellate defender system.

GOAL 1: Maintain and improve a statewide appellate defender system to provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to appeals at public expense.

OBJECTIVE: Monitor the existing appellate defender office to assure that it provides high quality services at a reasonable cost.

ACTION ITEM: Periodically adjust the balance of state employees and contract services to achieve the best result.

ACTION ITEM: Periodically update the agency's plan for providing appellate services for presentation to the Montana Public Defender Commission and other interested parties.

GOAL 2: Ensure that the system is free from undue political interference and conflicts of interest.

OBJECTIVE: Assist the criminal justice system to treat people without bias and to provide fair treatment to all.

ACTION ITEM: Monitor the agency's uniform procedure for identifying conflicts of interest.

ACTION ITEM: Identify attorneys who are available to handle post-conviction relief petitions.

GOAL 3: Monitor that appellate defender services are delivered by qualified and competent counsel.

OBJECTIVE: Staff and support the agency's training function.

ACTION ITEM: The training coordinator, in consultation with the Chief Public Defender and the Public Defender Commission, will design annual training programs that best achieve the goals of the agency, including goals of the appellate office.

ACTION ITEM: Provide for out-of-state specialized appellate training for one appellate attorney each year.

ACTION ITEM: The training coordinator will include appellate attorneys in trainings to further the understanding of appellate issues for all public defenders.

GOAL 4: Assure that the system utilizes state employees and contracted services to avoid conflicts of interest and to process appeals in a timely manner.

OBJECTIVE: Assure that the main focus of the Appellate Office of the Office of the State Public Defender is to provide the best appellate service. Assure that service is being provided by monitoring the performance of appellate attorneys.

ACTION ITEM: Continually identify attorneys willing to contract for appellate services.

GOAL 5: Advocate for adequate funding of the statewide appellate defender system.

OBJECTIVE: The agency will communicate to the Montana Public Defender Commission, all branches of state government, and other interested parties information related to the caseloads and costs of the appellate defender system.

**OFFICE OF THE STATE PUBLIC DEFENDER
LFD ISSUE -GOALS AND OBJECTIVES
PAGES D135 AND D128**

The agency has updated its goals and objectives for the Public Defender Program and has instituted them for the Appellate Program. We have a handout for the Subcommittee to review. Concerns exist that the goals are recited from Title 47, MCA. Our Commissioners, however, listened to recommendations from the original drafters of the title and instituted the purpose statement in the statute as its goals.

**OFFICE OF THE STATE PUBLIC DEFENDER
LFD ISSUES – IMPACT ON BASE BUDGET
Page D130**

The agency transferred \$127,000 from payroll to operating costs in the Public Defender Program to cover a shortfall in contract costs. The agency's goal was to live within its appropriation and avoid filing for supplemental funding by finding a way to cover all costs by using available resources during FY 2008. This transfer was less than 1 percent of the agency's total payroll appropriation. Contractor costs are expected to grow in the future due to increases in caseloads and as such the program will need every dollar in its current base plus the additional amount as noted in the decision package for case load growth.

**OFFICE OF THE STATE PUBLIC DEFENDER
LFD ISSUE – LACK OF DATA REGARDING TOTAL CASELOAD
Pages D130 and D124**

As per title 47 the agency reports on new caseloads for a fiscal year and not open caseloads. We can produce reports on open caseloads but the agency believes that this information may be misleading. Rather the agency would rather focus attention on its caseload management tool that weighs cases by case type. The agency did report using this tool.

**OFFICE OF THE STATE PUBLIC DEFENDER
LFD ISSUE – FAILURE TO COMPLY WITH TITLE 47 REPORTING
Pages D131 and D124**

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**OFFICE OF THE STATE PUBLIC DEFENDER
LFD ISSUE - IMPACT ON BASE BUDGET
D137**

The agency transferred \$20,000 from payroll to operating costs in the Appellate Defender Program to cover a shortfall in contract costs. The agency's goal was to live within its appropriations and not file for supplemental funding. The agency found a way to cover all costs within its available resources. This transfer was less than 2 percent of the program's total appropriation. Contractor costs are expected to grow due to an increase in filings of post conviction relief petitions. All of these petitions are handled by contract attorneys due to a conflict of interest situation. Most of these filings claim ineffective assistance of counsel.

OFFICE OF THE STATE PUBLIC DEFENDER

LFD ISSUE – REDUCE PROGRAM FUNDING BY \$220,000 PER YEAR

Page D135

The agency developed a strategic plan in 2006 to reflect how cases were to be handled throughout the system. This plan did not recognize that appellate cases were being worked by Program 1 (Public Defender) attorneys. The agency made the decision to move all of these cases to the Appellate Program because this program has the expertise to do this work. Funds were transferred to pay for this work.